TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 282.

THE TEXAS AND PACIFIC RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

MICHAEL CAREEN.

ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

FILED JANUARY 29, 1900.

(13,270.)

(18,370.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

No. 222.

THE TEXAS AND PACIFIC RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

MICHAEL CARLIN.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., FEBRUARY 11, 1903.

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a *Caption.*

UNITED STATES OF AMERICA,
Fifth Judicial Circuit.

Pleas and proceedings had and done at a regular term of the United States circuit court of appeals for the fifth circuit, begun on the third Monday of November, 1901, and held in the court-room of said court, in the city of New Orleans, before the Honorable Don A. Pardee, the Honorable A. P. McCormick, and the Honorable David D. Shelby, United States circuit judges for the fifth judicial circuit.

THE TEXAS & PACIFIC RAILWAY COMPANY, Plaintiff in Error,
vs.
MICHAEL CARLIN, Defendant in Error. } No. 1048.

Be it remembered that heretofore to wit, on the 13th day of April, 1901, a transcript of the record of the above styled and numbered cause, from the circuit court of the United States, for the northern district of Texas, was filed in the office of the clerk of said United States circuit court of appeals, for the fifth circuit, in the words and figures following to wit:

1 *Caption.*

Be it remembered, that at a term of the circuit court of the United States, in the fifth circuit thereof, and in and for the northern district of Texas, at Fort Worth, begun and holden at Fort Worth, Texas, on the 26th day of November, A. D. 1900, and which term adjourned on the 19th day of January, A. D. 1901, the Honorable Edward R. Meek, United States district judge for the northern district of Texas, presiding, the following proceedings were had and the following cause came on for trial and was tried, to wit:

MICHAEL CARLIN
versus
THE TEXAS & PACIFIC RAILWAY COMPANY. } No. 129.

Plaintiff's First Amended Original Petition.

Filed December 10th, 1900.

In the Circuit Court of the United States for the Northern District of Texas.

M. CARLIN
vs.
THE T. & P. R'Y Co. } No. 129.

To the Hon. E. R. Meek, judge of said court:

Now comes your petitioner, M. Carlin, a resident and citizen of the county of Tarrant and State of Texas, in the said northern dis-

trict of Texas, and by leave of the court files this his first amended original petition and complaining of the Texas & Pacific R'y Co., a corporation duly incorporated under and by virtue of the laws of the United States, the same being a citizen of another and different State than the State of Texas, to wit: the State of New York and complains to this honorable court for that heretofore, to wit: on the — day of Sept., 1898, the said plaintiff was an employé of the said defendant herein and was a member of the bridge gang of the said defendant working on the line of the said defendant's railway between the city of Fort Worth and the city of Weatherford, Texas.

2 That the said defendant is a corporation duly incorporated under and by virtue of the laws of the United States as aforesaid, and owns and operates a line of railroad in the State of Texas running through the counties of Tarrant, Parker and other counties of the said State and in the prosecution of its business of operating said line of railroad it became necessary for it to have, and it did have, amongst other employés, a bridge gang, which gang consisted of a foreman and a number of men whose duty it was, amongst other things, to repair bridges along the line of the said railway company in said counties. That the plaintiff herein as aforesaid was one of the said men who belonged to the said bridge gang and was under the direction and control of the said foreman of the said bridge gang.

That the foreman of the said bridge gang was not a fellow-servant of the said plaintiff herein in the employ of the said defendant. That the said foreman was entrusted by the said railroad company with the authority of superintendence, control and command of the individuals composing the said bridge gang, one of whom was the plaintiff, and all of whom were in the employ of the defendant.

That the said foreman had the authority to direct the said members of the said bridge gang in the performance of the duty of said bridge gang, as well as to employ and discharge the members of said gang, and that said foreman was vice-principal of the said defendant, and was in no manner a fellow-servant with the plaintiff herein.

And the said plaintiff further represents and shows to the court that amongst other things arising in the course of the duty of the said bridge gang, it became necessary to repair a certain bridge on the line of the railway of the said defendant near the Parker County line, that is the line between Parker county and Tarrant county, and that in pursuance of the duty, they acting in accordance therewith and in accordance with the order of the foreman of the said gang, went to the place where the said bridge was situated and with the purpose of repairing the same. That they arrived at the said place in the morning of the day on which happened the accident complained of hereinafter by the plaintiff.

That the duties of this plaintiff in connection with the repairing of the bridge aforesaid consisted amongst other things of his duty to obey the orders and directions of the said foreman, and of his duty to do such other things in and about the repairing of the said bridge as should become necessary under the circumstances. That amongst

other things it was his duty to do was the using of a saw, and
3 that at the time of his arrival at the said bridge as aforesaid,
his saw, which it was necessary for him to use in the repair-
ing of the said bridge, had become dull, and it became and was his
duty to sharpen the said saw, and that in the performance of sharp-
ening the said saw, and under the direction of the said foreman he
proceeded to sharpen the same as aforesaid. That in the sharpen-
ing of the said saw it became necessary for him to erect a temporary
hold for the same, which he proceeded to do on the abutment of the
said bridge, where the same was only high enough to strike him
about the breast. That he was there engaged in preparing to
sharpen his saw as aforesaid when he observed a train approaching
on the line of the said defendant's railroad from the west with great
speed. That he was not in any way warned or notified of the fact
that the said train was approaching or was about to approach the
said bridge at all, much less that the same was approaching or was
about to approach with great speed, but that he saw the train ap-
proaching and that the speed of the train was so great when he saw
same he became alarmed and started to and did walk away from
the approach of the said bridge upon which he had made his tem-
porary fixture for the purpose of sharpening his said saw as afore-
said. That when he noticed the approach of the said train he did
not notice that the said bridge upon which he, with the other
members of the said bridge gang under the direction of the said
foreman as aforesaid and under his control, were preparing to and
were repairing, was not entirely clear of obstruction, and he did not
know, nor did he see, that the said maul was upon said bridge.

And the plaintiff further charges and states the fact to be that the
said bridge at the time of the said approach of the said train was
not clear and free of obstructions, but that there was upon the bridge
a maul, to wit: a spike maul, the same being a heavy iron hammer
of the weight of six or ten pounds, attached to a handle of to wit:
three feet long, lying upon the bridge in such position that the
same could either be struck by the said train or could be jolted into
position to be struck by the said train by reason of the rapid motion
of the said train. The said maul was negligently left in said posi-
tion by one of the said bridge gang.

And plaintiff further charges and states the fact to be that while
he was walking away from the said abutment of the said bridge in
order that he might be some distance therefrom while the said train
was passing at the rapid speed hereinbefore mentioned, he was
struck by the said maul which had been left upon the bridge
4 as aforesaid, on the leg just above the knee. That the said
maul was struck by the said train in its passage over the said
bridge and was hurled by the said train against him, the said plain-
tiff, with such great force that it crushed and mangled his said leg
so that the same had to be and was amputated above the knee.

The plaintiff further charges and states the fact to be that amongst
other things it was the duty of the said railroad company to furnish
him, the said plaintiff, a safe place in which to work, and that it was
the duty of the said railway company by and through its foreman

in charge of the said gang as aforesaid, to see that said bridge upon which they were at work or were about to go to work, and about which they were engaged in the performance of their duties to the said railway company under the direction of its said foreman, was free from any and all obstruction before the said train was allowed to come upon the said bridge.

The plaintiff further charges and states the fact to be that it was the duty of the said foreman to see that the said bridge was clear of any and all obstructions that were likely to or could in the natural order of human events produce accidents to the men engaged in their work as aforesaid. And it was further the duty of the said foreman to see that flagmen were properly placed on either side of the said bridge in order that approaching trains could be and would be signalled to approach said bridge with caution, or to stop entirely as the case may be, until such obstructions as might be or were on said bridge could be by the foreman or under his orders and directions, removed therefrom, and the said bridge made free and clear of any and all obstructions likely to be struck by the said train and in the natural order of events produce injury to any of the said bridge gang working upon or around said bridge.

And the plaintiff further charges and states the fact to be that it was the duty of the said railway company to notify its engineers and conductors in charge of its trains what bridges were being repaired or worked upon and to state to them what bridges were occupied by a gang of bridge workmen working upon or around same in order that their said employés might approach the said bridge with due care and caution and in order that they might be on a special lookout for any and all obstructions that might be or were upon said bridge likely to cause injury to the said men working in, around and upon said bridge in order that the said trainmen might have and would have the said train under such control that they would be able to stop the said train in case they saw the said obstacles, and in order that the said train would not be run at such a rate of speed that it would hurl obstacles laying around the said track with such force as to produce injury to the said men working in, upon and about the said bridge.

And the plaintiff further alleges and states the fact to be that the said railway company and the said foreman negligently failed to perform each and every one of the duties herein alleged and charged to be their duty and states that the said foreman being upon the said bridge at the time of the approach of the said train negligently failing to cause the said maul or hammer to be removed therefrom, or to remove it himself, if he saw the same and that if he did not see the same that he negligently failed to see the same, said hammer being upon the said bridge at the time of the approach of the said train as aforesaid, and negligently failed to remove or have same removed. And the foreman negligently omitted to have flagmen stationed on either side of the said bridge in order that signals might be transmitted to the approaching train, causing the same to approach the said bridge under full control and at low rate of speed; and that the said railway company disregarded its duty in that it

did not inform its said trainmen of the fact that the said bridge was being repaired and that a gang of men would be upon the same repairing same, and in that the said trainmen approached the said bridge under a high rate of speed, to wit: thirty miles an hour, for here and now the plaintiff charges that it was the duty of said trainmen to approach the bridge which was being repaired at a slower and more moderate rate of speed than that at which the same was approached, and that the high rate of speed at which they approached said bridge contributed, amongst other things, to the injury caused to this plaintiff.

And this plaintiff further states and charges the fact to be that the negligence of the duty of the said railway company, and its vice-principals, to wit: its foreman, engineers and fireman whose negligence grew out of *and* the negligence of the company, contributed to and caused the accident hereinbefore complained of.

And this plaintiff further states the fact to be that when the said maul left upon the track as aforesaid was struck by the said train and hurled against him, crushing, bruising and mutilating and destroying his leg as aforesaid, he was thrown upon the ground and became insensible from the shock and pain attendant thereon. That it was many hours before he received or was able to receive any medical attention whatever, and that during said time he suffered the most intense pain of body and great anguish of mind. That in the evening he was sent to the city of Fort Worth and placed
6 in the hospital in said city, and that the physicians after consultation decided that it was necessary to amputate his said leg, and that they did so amputate it, all of which caused him much pain and suffering. That he was in the said hospital for many weeks under the treatment of physicians, during all of which time he suffered great pain. That he was a man of strong and robust constitution, fitted for the duties of foreman of a bridge gang, which had been his occupation for many years previous to the happening of the accident, and that at the time of the happening of the accident he was only temporarily employed for the reason that he was not at that time able to get employment of the grade to which he was entitled. That at the time aforesaid he was a man of about fifty-five years of age, strong and robust as aforesaid, with much experience in the line of bridge workmanship; that his services were actually worth $3.50 per day though at the time as aforesaid, temporarily he was receiving $2.40 per day. That as aforesaid for many weeks he was in the said hospital, utterly unable to stir or move without assistance, and that since the time of the said accident he has been unable to do any work of his employment, and has become utterly and permanently incapacitated from following his occupation as a bridgeman in which he had spent his life and in which all the experience that he had theretofore acquired had been concentrated. That he is incapacitated from earning a living except in so far as he may be assisted by his friends, all through the negligent action of the railway company and its vice-principals as aforesaid. That he has suffered much pain in addi-

tion to the actual physical loss of his leg as aforesaid and of his incapacity to do the work he had been accustomed to do.

That in addition thereto he incurred much expense for doctor's bill and hospital fees during the time aforesaid, in the sum of to wit: $200.00. That through the negligence of the railway company as aforesaid he has suffered great *hury* (hurt) and damage in to wit: the sum of $25,000.

Wherefore, plaintiff prays that the citation issue according to law, and that upon a final hearing of this case he have judgment against the said defendant for the said sum of $25,000.00 his damages as aforesaid, together with interest and costs, and for general relief.

ORRICK & TERRELL,
Attorneys for Plaintiff.

The foregoing has the following endorsements, to wit:

129. M. Carlin vs. Texas & Pacific Railway Co. Plaintiff's original petition. Filed 10th day of Dec., 1900. J. H. Finks, clerk, by J. B. Finks, deputy.

7 *Defendant's Amended Answer.*

Filed December 10th, 1900.

In the Circuit Court of the United States at Fort Worth, Texas.

MICHAEL CARLIN
vs.
THE TEXAS & PACIFIC R'Y CO. } No. 129.

Now comes defendant in the above-entitled cause and by leave of the court files this its amended original answer, in lieu of its original answer filed herein on the — day of —— and for such amended answer says:

1. Defendant demurs to plaintiff's petition and says the same is insufficient in law and shows no cause of action against it, of which it prays the judgment of the court.

2. It specially excepts to said petition for the reason that it appears that the alleged acts of the defendant were not the direct and proximate cause of the injuries to plaintiff.

3. For further answer, if so required, defendant denies all and singular the allegations in said petition contained and of this puts itself upon the country.

4. For further and special answer, defendant says plaintiff cannot recover for the reason that if there was any negligence at all of any of its employés, which it denies, that said agents or servants or employés were then and there the fellow-servants of plaintiff and that this defendant is not liable for any of the negligent acts of said parties.

5. For further special answer, defendant says plaintiff cannot recover for the reason that if there is any negligence on the part of this defendant, its agents, or servants, plaintiff himself was also

guilty of negligence which directly caused and contributed to the accident in question.

6. For further special answer defendant says that if there was any negligence or wrong on the part of this defendant, its agents or servants, in any of the acts alleged, that plaintiff was well acquainted with same, knew the manner in which its bridges were constructed, its trains were operated, and also knew that no flagmen had been sent out for the purpose of observing the approach of any trains, and knew fully the manner in which said trains would approach the bridge near which he was working, and that he had made no protest of the same, but remained in service with the full knowledge of the circumstances connected with the same,
8 and by reason of his said acts he should be deemed to have assumed all risks and dangers arising out of same, and by reason of which it says he ought not to recover.

STANLEY, SPOONTS & THOMPSON,
Attorneys for Defendant.

The foregoing has the following endorsements, to wit:
129. U. S. circuit court, Fort Worth, Texas. Michael Carlin *vs.* T. & P. R'y Co. Defendant's amended answer. Filed 10th day of Dec., 1900. J. H. Finks, clerk, by J. B. Finks, deputy.

Final Judgment.

From the minutes of the circuit court of the United States for the northern district of Texas, at Fort Worth, November term, A. D. 1900.

DECEMBER 11TH, 1900.

MICHAEL CARLIN
vs.
THE TEXAS & PACIFIC R'Y CO. } No. 129.

On the 10th day of December, A. D. 1900, this cause came on to be heard and came the plaintiff and defendants by their attorneys and both parties announced ready for trial, then came a jury of twelve good and lawful men, to wit: E. C. Turner and eleven others, who were duly selected, empaneled and sworn to try this case, and after having heard the argument of counsel and receiving the charge of the court, retired to consider of their verdict; and thereafter on the 11th day of December, A. D. 1900, they returned into open court the following verdict, to wit:

"We the jury find for the plaintiff and assess his damages at six thousand dollars.

E. C. TURNER, *Foreman.*"

And the court having heard said verdict approved and ordered same filed.

It is therefore ordered, adjudged and decreed that the plaintiff, Michael Carlin, do have and recover of and from the defendant, The

Texas & Pacific Railway Company, the sum of six thousand ($6000.00) dollars with all costs herein incurred respectively.

It is further ordered that the officers of court do have and recover of and from the parties hereto the costs by them respectively herein incurred, for which execution may issue.

Minute Book 1, pages 509 *et seq.*

9 *Amended Motion for New Trial.*

Filed January 7th, 1901.

In U. S. Circuit Court, Northern District of Texas, at Fort Worth.

MICHAEL CARLIN
vs.
THE TEXAS & PACIFIC R'Y CO. } No. 129.

Now comes the defendant, Texas & Pacific R'y Co., and by leave of court files this its amended motion for new trial and prays the court to set aside the verdict and judgment rendered herein, and grant a new trial for the following reasons:

1. The court erred in the admission of certain testimony, as will appear by bills of exceptions, and in the refusal to admit certain testimony, as will also appear by bills of exceptions.

2. There was error in the court's charge to the jury as follows: "The defendant is bound to exercise ordinary care and to furnish reasonably safe place within which employés can perform their duty. This care to be exercised depends upon any apparent danger which there may be."

3. The court erred in its definition of care, as follows: "Ordinary care is defined in law as such care as a person of ordinary prudence might be expected to exercise under similar circumstances. More than this, the law does not require, but less than this is negligence, or, in other words, negligence consists in omitting to do something which an ordinar-y prudent person would not omit, or in doing something which an ordinar-y prudent man would not do under similar circumstances."

4. The court also erred in charging the jury that the foreman of the bridge gang was, under the evidence, the vice-principal of the defendant company.

5. The court erred in charging the jury as follows: "If you believe from the evidence that the injury to plaintiff was caused by the negligence of a fellow-servant and the foreman in charge of the bridge gang was not guilty of negligence which directly and proximately contributed to the injury of plaintiff, then, and in that event, it will be your duty to find for the defendant."

6. The court erred in the definition of what act of negligence would be the proximate cause of the injury, as follows: "And you are charged that an act of negligence is the proximate cause
10 of an injury, if the act of negligence contributing to cause the injury was such an act that an ordinar-y careful and prudent

man could and would have anticipated the causing of the injury, under the facts and circumstances existing at the time, and which were known, or could have been known to him by the exercise of ordinary care, had he been in the foreman's place and stead, and it is not necessary in order to constitute an act of negligence, the proximate cause of an injury, that the particular accident could have been anticipated or foreseen, or that the particular person hurt would be hurt, nor that the accident or injury should happen or occur in the particular manner in which it did occur."

7. The court erred in refusing to give special charge No. 1, requested by the defendant.

8. The court erred in refusing to give special charge No. 3, requested by the defendant.

9. The court erred in refusing to give special charge No. 4, requested by defendant.

10. The court erred in refusing to give special charge No. 5, requested by the defendant.

11. The court erred in refusing to give special charge No. 7, requested by the defendant.

12. The court erred in refusing to give special charge No. 8, requested by the defendant.

13. The court erred in refusing to give special charge No. 9, requested by the defendant.

14. The verdict of the jury was excessive in amount and more than a fair and just construction of the testimony warranted, as it appeared from the evidence that the plaintiff was 55 years old, a single man and that he would soon be practically unfitted for the position of bridge carpenter, in which he had been practically engaged during his life; and, taking the age of the plaintiff, the testimony showed that he could not much longer act in the capacity and fulfill the duty of a bridge carpenter, and would soon be forced to quit such employment, and there was no evidence to show that his capacity to earn money had otherwise been diminished.

15. The verdict of the jury was contrary to the preponderance and great weight of the testimony, as it appeared that the bridge foreman had exercised due care and diligence in respect to seeing whether the bridge was clear of any obstructions.

16. The verdict of the jury was contrary to the evidence because it appeared that the direct and proximate cause of the injury
11 was evidently the negligence of one of the fellow-servants of plaintiff in leaving the maul so near the track and rails as to cause it to come in contact with the moving train.

17. The verdict was erroneous, because the evidence failed to show that the company was guilty of any act of negligence which was the direct and proximate cause of the injury.

18. The verdict of the jury was erroneous, because if it be granted that the foreman was guilty of negligence in failing to discover the position of the obstruction on the track, such act on his part was that of a fellow-servant of the plaintiff.

19. As it — within the knowledge of the court the evidence in this case required considerable time to be introduced, and the court

allowed ample time for argument, and the jury were not out more than twenty-five or thirty minutes in the consideration of their verdict, from which it is clear that they did not take time to properly consider and discuss the issues of law and fact submitted to them by the court.

STANLEY, SPOONTS & THOMPSON,
Attorneys for Defendants.

The foregoing has the following endorsement, to wit:
129. In U. S. court. Fort Worth, Texas, M. Carlin *vs.* T. & P. R'y Co. Amended motion for new trial. Filed 7th day of Jan'y, 1901. J. H. Finks, clerk, by J. B. Finks, deputy.

Order Overruling for New Trial.

From the minutes of the circuit court of the United States for the northern district of Texas, at Fort Worth, November term, A. D. 1900.

JANUARY 14TH, 1900.

MICHAEL CARLIN
vs.
THE TEXAS & PACIFIC R'Y CO. } No. 129.

On this day came on to be heard defendant's motion for a new trial, the court after hearing and considering same is of the opinion that said motion is not well taken, it is therefore ordered that the defendant be and is hereby denied a new trial.
Minute Book 1, page 545.

12 *Order Extending Time in which to File Bill of Exceptions.*

Filed January 16th, 1901.

M. CARLIN
vs.
TEXAS & PACIFIC RAILWAY COMPANY. }

In this case it is ordered by the court that thirty days from this date be allowed defendant, The Texas & Pacific Railway Company, in which to prepare and file its several bills of exception in this cause and that the time be so enlarged.
January 16th, 1901.

EDWARD R. MEEK,
Judge Presiding.

The foregoing has the following endorsement, to wit:
129. Order extending time, &c. Filed 16th day of Jan'y, 1901. J. H. Finks, clerk, by J. B. Finks, deputy.

Defendant's Bill of Exceptions.

Filed February 1st, 1901.

In the United States Circuit Court, Northern District of Texas, at Fort Worth.

MICHAEL CARLIN
vs.
TEXAS & PACIFIC R'Y CO.

Be it remembered, that on the 10th day of December, 1900, the above-entitled cause came on to be heard in the United States circuit court for the northern district of Texas, before Judge E. R. Meek, and a jury having been empaneled the following proceedings were had:

The pleadings having been read to the jury the following evidence, both for the plaintiff and defendant, was introduced before the court and the jury to sustain their respective contentions:

ED. CARROLL, witness for plaintiff, testified:

That in September, 1898, he was working for the T. & P. R'y Co. in what is known as the bridge gang. That Michael Carlin,
13 the plaintiff, was a member of this bridge gang and George Welsh was foreman of same. That it was the duty of the bridge gang under the directions of George Welsh, the foreman, to do work upon bridges in the way of building and repairing same. That he remembers the time of the accident occurring to plaintiff, Carlin. That on the day of the accident they left Weatherford, Texas, to go to work on a bridge near the Aledo water tank. This bridge was over a creek, was about sixty to seventy-five feet long and the approaches to the span were about thirty or forty feet. The water tank stood on the south side of the track, 60 to 75 feet from the end of the approach. On the west side the track was straight to a point between half a mile and a mile distant from the bridge, when there was a curve. They got to the bridge to go to work about 8.10 in the morning and went to work under Welsh, the foreman. There was a man by name of Line who was under Welsh. Just before the accident occurred, he was east of the bridge going after a piece of scantling, and heard some one say the train was coming and stepped off the track, and pretty soon after he stepped off the track the train passed him. That the train was a freight train going about thirty-five or forty miles an hour, and he did not know whether it carried flags or not. It was near the bridge before he saw it and had no notice given of its approach till some one said it was coming, and it was in 100 feet of the bridge. When the train got to the bridge, some of the men were on the bridge, some on the outside framing some timbers and some doing one thing and another. At the time the men were engaged in making repairs on the bridge. Soon after the train passed he looked around and saw Carlin lying on the ground near the bank, about sixty feet distant from the

witness. That they went and picked Carlin up and some one picked up a spike maul lying on the other side of Carlin with the handle broken off. That he had seen the spike maul before, that it had been used ever since he had been at work with the bridge gang and it had been used on the track that morning. That he had seen some of the men driving spikes and nails with it about ten or fifteen minutes before Carlin was hurt. Carlin was close to the end of the bridge. That when they picked him up they found his leg was crushed. That they then put him on a hand car and some of the men went off to the station east with him. That there were no flags out on the bridge that morning. That he heard no warning concerning the approach of the train except the warning that he testified about. At that time the engine was very near the west approach of the bridge. That he, witness, had been what was called a scratch
14 boss for eight months and was supposed to act as foreman when the foreman was not around, and he knew what the duties of a foreman were. Witness was asked to state what were the duties of a bridge foreman with reference to signaling approaching trains when engaged in repairing bridges and state what are the duties of a foreman with regard to seeing that a bridge is clear of obstruction when a train approaches. To which defendant objected as calling for a conclusion and opinion of the witness and not a fact. Which objection was overruled and defendant excepted. Witness answered that if the foreman was expected to do anything to a bridge that would injure a train he was supposed to put out flags and everybody else was supposed to see that there was no obstruction to the train as soon as he has got out the flags. Witness was asked what was his duty with reference to seeing that the bridge was clear, which question was objected to by defendant as calling for a conclusion and opinion of the witness and not a fact, which objection was overruled and defendant excepted, and witness answered that it would be the same thing, that is, to see that there was no obstruction and to see that it was clear at all times unless he had flags out.

On cross-examination, he testified that he was not at this time working for the railroad company; that his relations to plaintiff were friendly and that he had no bias in the matter. At the time of the accident they had been (at) work on the bridge about an hour or an hour and a half. That the track approaching the bridge from the west was about level but that about half a mile to the east of it there was a long hill called the Aledo hill. That right at the approach of the bridge there was a dump some four or five feet high; that the dump was wide enough for a man to stand away from the track and let a train pass by. That he saw some men on the bridge as the train passed and they stepped on to the sides of the bridge; that there was room enough on the sides of the bridge for a man to do this. That it was a usual matter for men to be working on a trestle and step out of the way and let a train pass. Carlin was on the north side of the bridge standing on the ground and in this position his waist would have been about level with the trestle which held up the track. That Carlin was fastening a clamp on the

ties to file saws. That the maul was an iron concern with a handle about three feet long, the hammer being six, eight, or probably ten inches in length and the handle went into the middle of the hammer, which had a double face. He saw Ed. Carver using it 10 or 15 minutes before train came. He was asked if Line was anything but a bridgeman himself and he said, Yes sir, he was a foreman, that he was a bridge carpenter and when he was wanted to superintend anything the foreman put him in charge of it. He was asked if it was not a fact that when they worked under Welsh, Line would do the same work as the witness, and he said No, if Line wanted to work he did, and if not, he did not work. That the foreman was supposed to put out flags when they needed them but that nobody else had the right to put them out; they were working under Walsh, who was the foreman; that they did not always send a man back to put out flags, but that it depended on the character of work which they were going to do. If the work on the bridge was of such a character as would be liable to make it weaker, they would send a man back, and if they were going to tear up a bridge any they were supposed to put out a flag, but if they did not, it was not necessary to put out flags. He was asked what he meant by saying it was the duty of the foreman to see that the bridge and track were clear, and he answered, to see that there was no obstruction there when the train came along if he had no flags out. He was asked if, while the foreman had flags out, and had time to clear the track were not the men also supposed to see that the track was clear, and he said Yes. He said also, that the foreman could not be at every place and he was asked if it was not anybody's business to see that the track was clear and he answered Yes, but it was his, the foreman's business to see that they did it. He was asked, "Suppose the foreman is under the bridge when the train comes along," and he answered that it did not shut him off from attending to his business, but he could not see if he was under the bridge. He was then asked the following question: "Then you would not rely, when working on a bridge, on the foreman to see that it was clear all the time," and he answered "No sir, and if I was a foreman I would not rely on the men all the time." He was then asked, "But you relied on each other," to which he answered, Yes, sir. He was asked if men working on and using material or anything on the bridge out on the track, when they got through with it, what they were supposed to do with it, and he answered, They were supposed to put it out of the way.

On redirect examination he said he did not know where Welsh, the foreman, was when the train came along, nor did he know where Line was.

Welsh put plaintiff to filing saws. That if the foreman had no flags out it was his duty to see that bridge is clear; that it is his business and is what he is for. That he himself had been a scratch boss and knew the duties of a foreman.

16 CHARLES NICHOLS, witness for plaintiff, testified:

At the time of the accident he was a bridge carpenter working for the defendant company and was in the same bridge gang as the former witness. That he remembers when the freight train came along, about the time Carlin got hurt. The freight train came from the west, running about thirty miles an hour. That he was standing about 150 feet east of the bridge when he first saw it. That he had gone there to get a piece of timber to use as a side brace for the scaffold. That he had been on the bridge before. That before the accident he had seen Ed. Carver out on the bridge using the spike maul, that he had left the bridge and gone out onto the track a minute or two before the accident, and Ed. Carver and the foreman were the only men on the bridge. That Welsh was on the bridge somewhere near the approach to the east end. That Ed. Line first called his attention to the train; that he heard no noise. That he and Line went out to pick up a piece of timber and had started back when Line said "Let's put this down and let the train go by," which was the first notice he had of it. The train at the time was nearly on the bridge. That he did not notice what the men on the bridge were doing at the time and did not hear any notice or warning given to them. That the curve west of the bridge was close, lacking but a few feet of being a mile from the bent of the bridge to the curve. That the train approaching did not make much noise.

The witness also testified that after the train passed that he noticed Carlin lying on the ground on the north side of the trestle and went down to see him and found his leg crushed or injured. He was asked how many men he left on the bridge with the foreman when he went off to get the piece of timber and he answered he did not know but one of the men was Ed. Carver and he did not know whether the foreman was on the approach or bridge bent and he did not know whether Ed. Carver stayed on the bridge when he went out to get the timber. That the place where Carlin fell was about twenty feet from the bridge span and several feet north of the bridge.

Witness then testified of assisting to carry Carlin up to the station, summoning a physician, etc.

He testified that the weight of the spike maul was about ten pounds, and described its appearance as given by the former witness. He testified that frequently when men were on the bridge and a train approached, the men would step out on one side to the caps of the bridge and allow the train to go by. The caps are

17 pieces of timber under the stringers and hold the stringers up, and the stringers were long pieces on which the ties rest parallel to the rails. That this was a combination bridge, being iron and wood. That the work they were doing on it was to strengthen it. That they drove piling inside the span and were capping it to strengthen the bridge. He was asked, Where work of that character was being done, what was the duty of the bridge foreman as to putting out flags and he said The foreman usually put out slow flags or had slow orders on the bridge by the dispatcher. The slow flag was a green flag stuck up by the side of the track.

and, in railroad parlance, meant for the trainmen to get the train under full control, so they could stop in a short distance if necessary. He was asked What was the duty of the foreman with reference to seeing the bridge was clear before the train approached and he said It was every one's duty, each man was to clear up the bridge when the train was coming, and it was the foreman's duty to give orders and he was supposed to give orders and see that the track was cleared up. He was asked if anything was left on the track whose duty it was to see that it was cleared away from there, and he said the foreman's.

On cross examination he said it was customary with all gangs that he had ever worked with, and he had been bridging about twelve years, for the foreman to see that the bridge was cleared, and that he gave it as his opinion from what the foreman usually did. That bridge carpenters were men of good intelligence. He was asked that if the foreman did not give the order and he, witness, was working on a bridge when a train came along and he saw a piece of timber lying across the track, would not he, witness, take it off and not wait for the foreman to give orders, and he answered that he was supposed to give orders to clear up the bridge, and he, the foreman, would not know whether any of the men saw a piece of timber or obstruction or not, but he was supposed to be standing around and give the men work to do and keep everything safe. He was asked to suppose he and another man were carrying a piece of scantling to a position on the track and if a train was coming, would they or anybody else sit down and wait for somebody else to tell them to throw it off, and he said no, they would not wait, but if they were working and had a timber lying clear across the track and saw a train coming they would throw it off. He was then asked if the bridge foreman had to be at work and watch all the men, to which he answered Yes. He was then asked if the foreman had to see that the work was being done right all the time, and he said No, not necessarily, but he could stand up above and give his orders as well as not, but did not do that all the time. He was
18 asked to suppose the foreman was down below when the train came along and he said that he was supposed to have the bridge clear, or have slow flags out, but that if he had not flags out to have everything cleared before he goes below. He was asked, Supposing a man is using a maul and he, the foreman, wanted to go below, would he, the foreman, be supposed to tell the fellow that was using the maul where to put it when the train came along, and he said No, but if a man has a tool in his hand he is supposed to put it out of the way where it would not be run over. He said oftentimes they would keep a hand car, or push car, on the bridge, and when they had it out there and a train would come along the foreman generally gave orders to run it off. He was asked if two or three men were on the bridge with the hand or push car, and the foreman was down below, and a train was coming, if they would wait for orders to run it off, and answered, The men were supposed to clear everything safe, but the foreman was supposed to see that they did it and if the foreman was not there he always put

a man in charge over them. That the foreman was in charge that morning himself. That Line was there that morning and was working the same as the rest of them. That he had no control over the men, but had been running an extra gang, but on that particular day he was just the same as the rest of the men.

With reference to putting out flags, he said if slow orders were given they did not put out flags every time they worked on a bridge, but it depended on the character of the work they were going to do, and it was the foreman's business to determine whether it was necessary to put out flags or not. The flags were put out in order to keep a train from coming on the bridge where it might be weakened by reason of the work or when they were unloading a car of timber on the bridge, which they sometimes did, and sometimes they had the bridge jacked up changing timbers, but if they did not have any heavy timbers on the bridge or anything that could not be handled in a reasonable time they just put out slow flags. That if the men were just working round there and the bridge was not weakened in any way, they did not put out slow flags.

On redirect examination he said it was not peremptorily required to have out slow flags when the hand car was on the bridge. Also, that when he left the bridge to go after the timbers he could not say where Welsh was but was somewhere near the approach of the bridge. That there were no flags out that morning.

The surface of the bridge was plain, that is, the ties were
19 about 8 inches apart and there was nothing on top of them except the rails and the guard-rails, the rails were of ordinary size, the guard-rails were about 10 inches from rails and parallel with them, the guard-rails were 8 inches across or wide and stood up about 4 inches above ties, they were let down over the ties about 2 inches, they were of wood. The length of span was about 60 feet, a bent is 15 feet, the east approach consisted of two bents.

MICHAEL CARLIN, plaintiff, testified:

That he was fifty-five years old and a member of the bridge gang under George Welsh, working near Aledo tank bridge in Sept., 1898, at the time he was hurt. He had previously been working under Line, but on the day in question Welsh was foreman. He thinks they were preparing to put in some false work on the bridge to strengthen it, but just after they got there some one ordered him to file some saws and was attaching a clamp to the bridge for this purpose when he was hurt. He was about twenty-six feet from the bridge at the time. He happened to look up and saw the train approaching, being right at the end of the bridge at the time. The train was moving very rapidly and he started to walk away from the bridge while the train passed. He was facing north, away from the bridge and had taken three or four steps when something struck him, but don't know what, striking him between the knee and ankle, breaking the bone, and because of which he was taken to the hospital at Fort Worth, where he remained confined for some time and where his leg was amputated above the knee. He stated that he was a bridge carpenter and had been for years. Here witness was

asked if he had been a bridge foreman and what his services as a bridge foreman were reasonably worth, to which defendant objected. Objection was overruled and defendant excepted, when plaintiff answered his services were reasonably worth $4.50 per day, but that he was earning at the time of the accident $2.40, which were the lowest wages he had worked for for several years. He did not know where the foreman was when he was hurt, or just previously. He stated that it was the duty of the bridge foreman to see that the track on the bridge was clear and nothing on it if a train was seen approaching. Witness does not believe that any flags were out at the time of the accident, but states it is owing to the character of work to be done whether flags should be put out or not, but on being asked what was the duty of the foreman in view of the character of work about to be done on this bridge, as to putting flags out, he answered it was the duty of the foreman to have slow flags out anyway for the safety of the men. About twelve or fourteen men were working on the bridge at the time. Witness states that a man with one leg cannot follow the occupation of bridge carpenter.

On cross-examination witness stated that he had been working for the T. & P. about a month and had been employed by Mr. Welsh. Before that had been working between Fort Worth and Whitesboro and had also done a little work for the Ft. W. & R. G. He stated he quit voluntarily when working for the T. & P. from Fort Worth to Whitesboro and thought he was as active as any of the men. He said after he got off at this bridge he helped carry some plank before he was ordered to file saws, and had been working but a short time before he was hurt. That he carried the plank from near the tank out to different places on the bridge, but when I went to file saws did not see any plank on top of the bridge.

The work that morning was what is called substructure work underneath the bridge, and so far as he knew would not weaken the bridge at all, but was intended to strengthen it. Witness states that sometimes in work of this kind flags are put out, but that they are intended to be used only when the track is obstructed or the bridge weakened, and then it is the custom to send a man out each way, but if the men were simply working on top of the bridge no flag would be out. The men on top are supposed to be on the lookout for trains of course.

That when a man is using a tool, such as a hammer to drive spikes, he is supposed to put it out of the way when he has finished with it, and an old experienced bridgeman will do it, but it is the business of the foreman to watch a green man.

The foreman is supposed to have supervision of the work and to be at various places. As a rule the men have not interest enough to see that everything is clear and the foreman should be in a position to watch. In my experience as a bridgeman I cannot recollect of but one man that was hurt while below the bridge by a passing train. I have seen men every day working on top of the bridge step to one side and get out of the way when a train would come and we must expect trains at any moment and be ready for them. If we

were working on timbers near the bridge we would not expect to have a slow order or flags out. Witness states that he heard no warning of the train coming but saw it himself. Witness also states that, being to one side of the bridge, he would be as much on the lookout for trains as a man on top of the bridge. Witness states he never felt any swimming in his head on account of being on high bridges. It is a rare thing for men of my age to be working
21 on bridges and as a rule they have younger men. In answer to question by the court as to whether it is the duty of men on the bridge to see that the track is clear for a coming train, witness states it is their duty.

E. M. CARVER, witness for plaintiff, testified:

Witness testified he remembered the accident to Mr. Carlin and that he had been a member of that gang about three months and had been a bridge carpenter about a year. That he had been assisting to put some braces on the side of the bridge that morning and when the train passed he was beside the bridge near the east end, standing on the ground, and had been there but a few minutes. That at the time the foreman was standing on the side of the bridge. Just prior to that time he (witness) had been working on the north side of the track near the east end of the bridge, about ten feet from the end of the approach, that he and the foreman were the only persons on the bridge. After the witness nailed the last piece of timber on the bridge he got down on the ground and was about ten feet from Mr. Carlin and had been there not over three or four minutes when the train passed. That he had been using a top maul driving spikes that morning but don't remember where he had put it down when he finished using it, but was always careful to put it out of the way so there would be no accident. He stated he would not be sure that he had the top maul or the spike maul, but was pretty sure it was the small maul, that you can handle with one hand. Witness states he saw the maul lying near Mr. Carlin after the accident and that he had seen it before that morning lying on the bridge; that the handle was broken off after Mr. Carlin was hurt was found that way, broken off near the head.

Witness testified as to going with plaintiff as did the first witness, securing a physician, etc.

Witness assisted, after he finished bracing the bridge, to handle some timbers. That he got to plaintiff first after he was hurt. That he did not remember of seeing any one else on the bridge by the foreman at the time. Witness described the spike maul as did the former witnesses and says a top maul is a smaller hammer that can be used with one hand, but cannot say for certain that he saw both of these mauls on the bridge that morning.

On cross-examination he stated that he was using one maul but was not sure which one it was. He nailed the top of the brace just below the stringer and were preparing to put a scaffold on the bridge to work on. That he could not say where the maul he was
22 using had been left. That he had been working somewhere near the west end of the trestle where it joined the bridge.

That the place he got from the trestle to the ground was about two and three feet high. When he got off the bridge, as well as he remembers, the foreman — standing at the east end of the bridge and then walked toward the trestle at the west end, and when the train passed was standing on the bridge on the south side. Witness stated he was not now in the employ of the defendant, but at the time of the accident was working as a bridge carpenter. His attention was first attracted to the train by its noise. The train can be seen about 200 yards from the west end of the bridge, looking west, but in reply to the question witness says he don't know much about it.

I. E. LINE, testified for defendant:

That he was a member of the same bridge gang with Carlin when he was hurt and had known him about a month. That previous to this time he had been in charge of part of the gang but on this particular day was working under Welsh the same as the rest of the men, and would be classed as a bridge carpenter. The grade of work they were doing on the bridge was called putting in false work and its purpose was to strengthen the bridge, but it did not weaken it while the work was in progress. The bridge was a combination iron and wood structure and consisted of an approach or trestle and the bridge proper. That the character of the work they were doing did not disturb or obstruct the track in any way and they were not going to move or repair the rails in any way. All the work that was being done on the top was to carry boards out and fix scaffolding to the side. Witness states he was about one hundreds yards east of the bridge when the train came, going after some timbers with others. Looking west from that bridge witness states a train can be seen for about a mile as it is a straight track for about a mile to the curve. There had been a spike maul or hammer used there that morning and witness states he used it himself just before he went out for the timber for the scaffold. He states he was using it on the south side of the bridge for putting up the staging or scaffold. When he finished he handed it to some one on top of the bridge who handed it to Mr. Carver on the north side of the bridge to spike on a brace. Witness states he does not recollect of seeing any other spike maul or hammer there that morning than the one he used which was the regular spike maul described by former witnesses. Here witness testifies as to finding of maul after the train passed as did other witnesses. Witness states he has been in the
23 bridge business for eight years and from his experience he stated, taking into consideration the character of work being done that morning that it was not customary to have out slow flags for it, nor was it customary to have a flag out to stop a train for that character of work. Witness stated they hardly ever put out slow flags and only did it when they were doing work of such character that they could not get the bridge clear in a few minutes or doing work that would require the train to cross the bridge slowly or when the track was disturbed. Ordinary trains make the same rate of speed over bridges as the other parts of the

track unless slow orders are out. The train was going, to the best of his judgment, about twenty-five miles an hour.

On — examination he stated he did not particularly notice the speed of the train. That they had been using a push-car to take some timbers out on the bridge, but don't remember whether it was before or after the accident. Referring to slow flags, witness states that he had never known in his experience but once when a slow flag was stuck by the side of the track, but that when they were to be used a man was always sent back with a red flag and torpedoes. The engineer is supposed to stop if he runs over two torpedoes. Witness states that he does not know what a blue flag is used for and the bridgemen do not use it at all. The regular slow flag is a green flag. That he never heard of any rule requiring slow flags to be put out when timbers were being handled on the bridge. There were several men working up at the east end of the bridge, and Carver among them. The witness stated the train was about a quarter of a mile from him when he first saw the train.

ED CARVER, recalled by defendant, testified:

That he testified on the former trial of this case and does not recollect that he testified about using a spike maul but on examination of statement he furnished to defendant at time of accident says it was a spike maul that was being used and it must have been the one that was found near Carlin.

F. J. HUNTOON, stenographer, stated:

That he reported this case at the former trial and on reference to notes of that trial says that witness testified at that trial that he had seen a spike maul that morning but did not remember whether he used it or not, but thought he did.

24 GEORGE WELSH, witness for defendant, testified:

That he was the bridge foreman of the T. & P. R'y Co. and was in charge of the work the morning the plaintiff was injured. Witness testified as to character of work on the bridge the same as former witness. Also as to distance a train could — been seen west of the bridge. That he was about the middle of the first span when he saw the train coming; that he will not be positive whether there were any others on the bridge or not but thinks one or two others were. When he saw the train coming he looked up and down the track to see if everything was clear, did not see anything and stepped to one side when the train was three or four hundred yards from him. He states he would have had plenty of time, if there had been anything on the bridge to have gotten it off. He does not recollect seeing any one using the spike maul that morning. That he was foreman and had been around all parts of the bridge, both on top and underneath it. That Carlin was preparing to file saws when he was hurt. That there was no flag out that morning, as it was not necessary, the track was not obstructed, all the work being down below. When a man is using tools and gets through with them he is supposed to put them out of the way where a train will

not strike them. The foreman is liable to be anywhere about the bridge at any time and cannot be depended — to be at any place, but if there were men working on top of the bridge it would be their duty to be on the lookout always, as they must expect a train at any time and we do not know when one is liable to be along. Witness says slow flags are very rarely used. He did not see anything fly toward Mr. Carlin, but did see him fall but some of the men got there before he did. The train was going, to the best of his judgment twenty-five or thirty miles an hour.

On cross-examination witness stated they did not carry any heavy timbers out on the bridge that morning as it was not necessary, but they would carry the staging planks out on the dump and then underneath the bridge. We had no car but the section foreman had one and we may have borrowed it from him to carry some timbers out, but I do not recollect now and cannot say. That the slow flag is the blue flag and the green flag is not used in the bridge department. That he did not consider it necessary to put out slow flags that morning as the track was not obstructed. That he never uses slow flags but always uses the red flag to stop a train. At the time he had been bridge foreman nearly a year. When timbers are being carried on a bridge it is left with the foreman as to putting out flags, and he does not do it unless he thinks he cannot clear the track in a very short time. That when he first saw the train he called that fact out and examined the track.

On redirect examination witness stated he was about fifty or sixty feet from plaintiff when he fell. Witness also testified that as bridge foreman he had employed Carlin and had supervision over him and had power to employ and discharge him as well as all of the other bridgemen who were working there on that morning.

F. W. Race, witness for defendant testified.

That he was the engineer of the train which crossed the bridge when Carlin was hurt. That he had been running over that part of the road for nearly eighteen years. That the curve west of the bridge is about three-quarters of a mile distant. The track there is about level but inclines a little to the east. That the track east of the bridge is straight about a quarter of a mile, and then a curve commences and also the hill called Aledo hill. That he did not see or notice anything on the track that morning as he approached the bridge.

On cross-examination he stated that he had no recollection of the injury to Carlin but that it was brought to his attention some days afterwards. That he did not know what speed he was running when he approached the bridge that morning. When we see slow flags we are supposed to get our train under full control. Slow flags are blue flags by side of the track and the red flag is the danger signal, when we come to a stop. It is an unusual thing for slow flags to be put out, the red flag being usually used. Witness states that he does not recollect of any time that he ever saw a blue flag

out for men working on a bridge, but often have it for men working on the track, in a department different from the bridge department. Witness is asked if it is not customary or usual when work is being done on a bridge for engineers to be informed of the fact by the company, to which he answered that whenever the bridge gang is working on a bridge and they are going to have the bridge in such condition that it is not safe to pass over it at a high rate of speed, they generally notify the dispatcher's office and he gives a slow order over it, when it is not necessary to put out flags. We did not have a slow order over this bridge at this time. He states that they do not slow down and run cautiously upon a bridge when they see men working about it, unless they have a slow order.

The above is a full, correct and substantial statement of all the evidence in the case and after the same had been introduced,
26 before the *court* and the court, the court, after defining to the jury the issues made upon the pleadings in the matters to be submitted to the jury, charged the jury as follows:

1. That the burden of the proof was upon the plaintiff and he must establish by a preponderance and greater weight of evidence, that the defendant was negligent and that the plaintiff was injured thereby, and the extent of his damages, and that if they found defendant was not negligent, they should render a verdict in its favor.

2. "The defendant is bound to exercise ordinary care to furnish a reasonably safe place within which employés can perform their duties. This care to be exercised depends upon any apparent danger there may be. The defendant is not bound to exercise extraordinary care, but only ordinary care, to keep its premises in a safe and good condition. Ordinary care is defined in law as such care as a person of ordinary prudence might be expected to exercise under similar circumstances. More than this the law does not require, but less than this is negligence. Or, in other words, negligence consists in omitting to do something which an ordinar-y prudent man would not omit, or in doing something which an ordinar-y prudent man would not do under similar circumstances."

3. "The foreman of the bridge gang was, under the evidence, the vice-principal of the defendant company. The negligence of which plaintiff accuses defendant consists in the failure on the part of the foreman of said bridge gang to use ordinary care to remove, or to see and remove the spike maul before the arrival of said train at said bridge."

4. "If you believe from the evidence that the spike maul testified about was left on the bridge by a fellow-servant of plaintiff, and you further believe from the evidence that at the time the train approached, the foreman of said bridge gang was the only person upon said bridge, and that he could, by the exercise of ordinary care, as I have defined same herein, have seen said spike maul and removed same from the track and from proximity thereto, if you believe it was on the track or in proximity thereto, and if you further believe it was the duty of such foreman to use such care to see that the track was clear and no obstruction on the track, or so near it as to be

struck by a passing train, and if you further believe said foreman did not use such care and that said spike maul or hammer was struck by said train and hurled against said plaintiff and caused him said injuries and if you further believe that it was negligence of the foreman in failing to see and remove said spike maul,
27 if you find his negligence in that respect was the direct and proximate cause of the injury sustained by plaintiff, then you should find for the plaintiff."

5. "If you believe from the evidence that the injury to plaintiff was caused by the negligence of a fellow-servant and that the foreman in charge of the bridge gang was not guilty of negligence which directly and proximately contributed to the injury of plaintiff, then, and in that event, it would be your duty to find for the defendant."

6. "If you should find that the defendant, through the foreman of the bridge gang, was guilty of negligence, you must also find that the negligence of the foreman was the proximate cause of the accident and injury to plaintiff. And you are charged that an act of negligence is the proximate cause of an injury, if the act of negligence contributed to cause the injury, and was such an act that an ordinar-y careful and prudent man could and would have anticipated the causing of the injury under the facts and circumstances existing at the time and which were known or could have been known to him by the exercise of ordinary care had he been in the foreman's place and stead; and it is not necessary in order to constitute an act of negligence, to proximate cause of an injury, that the particular accident could have been anticipated or foreseen, or that the particular person hurt would be hurt nor that the accident or injury should happen or occur in the particular manner in which it did occur."

7. "On the other hand, the defendant company should not be held responsible for the consequences of an act of negligence, which consequence ought not reasonably to have been foreseen. In other words, it ought not to be deemed actionable negligence to fail to do an act when it was not anticipated and should not have been anticipated by a man of ordinary care and prudence that such failure to perform the act would result in injury to any one. To require this would be to demand of human nature a degree of care incompatible with the prosecution of the ordinary avocations of life."

At the request of defendant, the court gave the following special charge, being special charge No. 6:

"The jury are instructed that the bridge foreman in making his examination of the track as the train approached, to see if any obstructions were upon it or near it, had the right to take into consideration that it was the rule and instructions for all persons using tools to so leave them as not to be in danger of passing trains,
28 and in determining whether or not the foreman was negligent; they should take this fact into consideration."

The defendant asked the court to give also the following special charges:

Special charge No. 1. "In this case, the jury are instructed that

under the law and the evidence, plaintiff is not entitled to recover, and they will, therefore, find a verdict for the defendant."

Special charge No. 2. "In this case, the jury will not consider as elements of negligence the rate of speed at which the train may have been running or the fact that the bridge foreman did not have any flags out on that occasion, and they will, therefore, eliminate these matters from their determination of the liability of defendant in this case."

Special charge No. 3. "The jury are instructed that in order to find the defendant liable for any act of the bridge foreman, they must find that any failure on his part to discover the close proximity of the maul was negligence; that is, he failed to do what a person of ordinary prudence would have done under like or similar circumstances.

"They must also find that such negligent act was the proximate cause of the injury; that is, that the injury was the natural and probable consequence of the negligent or wrongful act and that it ought to have been foreseen in the light of the attending circumstances. Probable consequence is when it is more likely to follow this supposed cause than it is to fail to follow it.

"Bearing in mind the above definitions, the court further instructs you that although you may find the foreman failed to exercise ordinary care to discover the maul, yet, if you believe from the evidence that the result which followed from his failure to discover it was not such result as ought to have been foreseen in the light of the attending circumstances, then, in such event, the foreman in failing to discover the proximity of the hammer would not be such negligence as would make the defendant liable, and it would be the duty of the jury to find for defendant."

Special charge No. 4. "The court instructs the jury that the burden of proof is upon the plaintiff to show negligence and show that such negligence was the direct and proximate cause of the injury, and unless he has done so, they will find for the defendant."

Special charge No. 5. "If the jury find that the maul or hammer had been in use by one Ed. Carver just before the accident, and was by him left in close or dangerous proximity to the rail or
29 track, and that this act of Carver was the direct and proximate cause of the accident, they will then find for defendant, as it would not be liable for any of the negligent acts of the said Carver, as he would be a fellow-servant of plaintiff."

Special charge No. 7. "Although Welsh, the bridge foreman, may have been, in law, the representative of the company, yet, if they find that the act of examining the track, as the train might be approaching, for the purpose of ascertaining whether or not any obstruction was upon or near it, was a duty — may be expected to be performed by any one of the men, irrespective of his grade or rank, that is to say, by the foreman and men alike as occasion and circumstances might require; then, in such event, the act or duty of Welsh in this respect was one which existed between fellow-servants and defendant would not be liable for the negligent acts of Welsh in this respect, if any there were."

Special charge No. 8. "The jury are instructed that the foreman was not required to assume that any one of the men who had been using any tool would be negligent in respect to where it should be left, but he had a right to assume that such person would leave it in such position as not to be in dangerous proximity to the track, and in making his examination of the track as the train approached, ordinary care would not have required him to anticipate or suppose that Carver had been negligent in respect to the place where he had left the maul in question."

Special charge No. 9. "If the evidence in this case justifies the conclusion that the accident was an unforeseen one, as is equally consistent as the conclusion that it should have been anticipated, in view of the surrounding circumstances, then, in such event, the jury should bring in a verdict for defendant."

All of which said instructions were properly signed by the attorneys for the defendant, and the same were refused by the judge presiding and filed by the clerk in this cause, whereupon the attorneys for the defendant, in open court and before the jury had withdrawn from the bar or left the jury-box, made the following exceptions to the charge given by the court:

1. It excepted to that part of the charge set forth in paragraph 2, wherein the court defined ordinary care as such care as a person of ordinary prudence would be expected to exercise under similar circumstances.

2. It excepted to the definition of negligence given by the court in said paragraph, wherein the court defined negligence to consist in omitting to do something which an ordinar-y prudent man would — admit, or in doing something which an ordinar-y prudent man would not do under similar circumstances.

3. It excepted also to the charge of the court as set out in paragraph three, wherein the court charged the jury that the foreman of the bridge gang was, under the evidence, the vice-principal of the defendant company.

4. It also excepted to the charge of the court as set forth in the fifth paragraph, wherein the court charged the jury if they found, from the evidence, that the injury to plaintiff was caused by the negligence of a fellow-servant and that the foreman in charge of the bridge gang was not guilty of negligence which directly and proximately contributed to the injury to plaintiff, then and in that event, it would be their duty to find — the defendant.

5. The defendant also excepted to the refusal of the court to give special charge No. 1.

6. The defendant also excepted to the refusal of the court to give special charge No. 2.

7. The defendant also excepted to the refusal of the court to give special charge No. 3.

8. The defendant also excepted to the refusal of the court to give special charge No. 4.

9. The defendant also excepted to the refusal of the court to give special charge No. 5.

10. The defendant also excepted to the refusal of the court to give special charge No. 7.

11. The defendant also excepted to the refusal of the court to give special charge No. 8.

12. The defendant also excepted to the refusal of the court to give special charge No. 9.

The jury retired and after consideration of the evidence and the charge of the court, returned a verdict, which is copied in the record, and defendant filed motion for new trial, which was overruled by the court.

The foregoing bill of exceptions now being duly considered by the court on this first day of February, A. D. 1901, within the time allowed and granted by the court within which to file bill of exceptions, the same is hereby approved, signed and ordered to be made a part of the record herein.

EDWARD R. MEEK,
United States District Judge.

The foregoing has the following endorsement, to wit:

31 129. In U. S. circuit court at Fort Worth, Texas. Michael Carlin *vs.* T. & P. R'y Co. Defendant's bill of exceptions. Filed 1st day of Feb'y, 1901. J. H. Finks, clerk, by J. B. Finks, deputy.

Assignment of Errors.

Filed March 14th, 1901.

In the U. S. Circuit Court, Northern District of Texas, at Fort Worth.

MICHAEL CARLIN
vs.
TEXAS & PACIFIC RAILWAY COMPANY. } No. 129.

Now comes the defendant, Texas & Pacific Railway Company, by counsel and says that in the record of proceedings in the above-entitled cause there is manifest error, and files the following assignments of error:

1. There was error of the court in the second paragraph of the court's charge, wherein the court, in defining negligence instructed the jury as follows: "Or, in other words, negligence consists in omitting to do something which an ordinar-y prudent man would not omit and in doing something which an ordinar-y prudent man would — do under similar circumstances."

2. The court erred in the third paragraph of its charge, wherein the court instructed the jury as follows: "The foreman of the bridge gang was, under the evidence, the vice-principal of the defendant company."

3. There was error of the court in the fifth paragraph of the court's charge wherein the court instructed the jury as follows: "If you believe from the evidence that the injury to plaintiff was caused by the negligence of a fellow-servant and that the foreman in

charge of the bridge gang was not guilty of negligence which directly and proximately contributed to the injury of the plaintiff, then, and in that event, it would be your duty to find for the defendant.

4. There was error of the court in refusing to give special charge No. 1 requested by the defendant, which is as follows: "In this case the jury are instructed that under the law and evidence, plaintiff is not entitled to recover, and they will, therefore, find a verdict for the defendant."

5. There was error of the court in refusing to give special charge No. 2, requested by the defendant, which is as follows:
32 "In this case the jury will not consider as elements of negligence the rate of speed at which the train may have been running or the fact that the bridge foreman did not have any flags out on that occasion, and they will, therefore, eliminate these matters from their determination of the liability of the defendant in this case."

6. There was error of the court in refusing to give special charge No. 3, requested by the defendant, which is as follows: "The jury are instructed that in order to find the defendant liable for any act of the bridge foreman, they must find that any failure on his part to discover the close proximity of the maul was negligence; that is, he failed to do what a person of ordinary prudence would have done under like or similar circumstances."

They must also find that such negligent act was the proximate cause of the injury, that is, that the injury was the natural and probable consequence of the negligent or wrongful act and that it ought to have been foreseen in the light of the attending circumstances. Probable consequence is when it is more likely to follow this supposed cause than it is to fail to follow it.

Bearing in mind the above definitions, the court further instructs you that although you may find the foreman failed to exercise ordinary care to discover the maul, yet if you believe from the evidence that the result which followed from his failure to discover it was not such result as ought to have been foreseen in the light of the attending circumstances, then in such event, the foreman in failing to discover the proximity of the hammer would not be such negligence as would make the defendant liable, and it would be the duty of the jury to find for defendant.

7. There was error of the court in refusing to give special charge No. 4, requested by the defendant, which is as follows: "The court instructs the jury that the burden of proof is upon the plaintiff to show negligence and show that such negligence was the direct and proximate cause of the injury, and unless he has done so, they will find for the defendant."

8. There was error of the court in refusing to give special charge No. 5, requested by the defendant, which is as follows: "If the jury find that the maul or hammer had been in use by one Ed. Carver just before the accident and was by him left in close or dangerous proximity to the rail or track, and that this act of Carver was the direct and proximate cause of the accident, they will find for de-

fendant, as it would not be liable for any of the negligent acts of the said Carver, as he would be a fellow-servant of plaintiff."

33 9. There was error of the court in refusing to give special charge No. 7, requested by the defendant, which is as follows: "Although Welsh, the bridge foreman, may have been, in law, the representative of the company, yet if they find that the act of examining the track, as the train might be approaching for the purpose of ascertaining whether or not any obstruction was upon or near it, was a duty — may be expected to be performed by any one of the men, irrespective of his grade, or rank, that is to say, by the foreman and men alike as occasion and circumstances might require; then, in such event the act or duty of Welsh in this respect was one which existed between fellow-servants and defendant would not be liable for the negligent acts of Welsh in this respect, if any there were."

10. There was error of the court in refusing to give special charge No. 8, requested by the defendant, which is as follows: "The jury are instructed that the foreman was not required to assume that any one of the men who had been using any tool would be negligent in respect to where it should be left, but he had a right to assume that such person would leave it in such position as not to be in dangerous proximity to the track, and in making his examination of the track as the train approached, ordinary care would not have required him to anticipate or suppose that Carver had been negligent in respect to the place where he had left the maul in question."

11. There was error of the court in refusing to give special charge No. 9, requested by the defendant, which is as follows: "If the evidence in this case justifies the conclusion that the accident was an unforeseen one, as is equally consistent as the conclusion that it should have been anticipated, in view of the surrounding circumstances, then, in such event, the jury should bring in a verdict for defendant."

12. The witness Ed. Carroll was asked what were the duties of a bridge foreman with reference to signaling approaching trains when engaged in repairing bridges and to state what were the duties of a foreman in regard to seeing that a bridge is clear of obstructions when a train approaches, to which question defendant objected as calling for a conclusion and opinion of the witness and not a fact, which objection was overruled and witness answered that if the foreman was expected to do anything to a bridge that would injure a train, he was supposed to put out flags and everybody else was supposed to see that there was no obstruction to the train as soon as he got out the flags. The court overruled the defendant's objection and allowed the evidence to be admitted, which was error.

13. The same witness was also asked by plaintiff's counsel

34 what was his duty with reference to seeing that the bridge was clear, to which defendant objected as calling for a conclusion and opinion of the witness and not a fact. The witness answered that it would be the same thing, that is to see that there was no obstruction and to see that it was clear at all times unless he had

flags out. There was error in the court in admitting this testimony over the objection of the defendant.

14. The verdict of the jury was against the evidence for the reason that it appeared from the evidence that the defendant's servants had exercised due care to discover any danger or any obstructions on the track.

15. The verdict of the jury was contrary to the evidence because it appeared that if there was any negligence at all, that it was the negligence of a fellow-servant of plaintiff.

16. The verdict of the jury was contrary to the law and the evidence in that it appeared from the evidence that the negligence of the foreman in failing to discover the obstruction on the track was not the proximate and direct cause of the accident.

17. The verdict of the jury was without sufficient evidence to sustain it, because it appeared from the evidence that the direct and proximate cause of the accident was the negligence of Ed. Carver in leaving the hammer on the track, and the defendant could not have reasonably anticipated that such would have been done.

T. J. FREEMAN,
F. B. STANLEY,
M. A. SPOONTS,
GEORGE THOMPSON,
Attorneys for Defendant.

The foregoing has the following endorsement, to wit:

129. In U. S. circuit court at Fort Worth, Texas. Michael Carlin vs. Texas & Pacific Railway Company. Assignment of errors. Filed 14th day of March, 1901. J. H. Finks, clerk, by J. B. Finks, deputy.

Petition for Writ of Error.

Filed March 14th, 1901.

In the Circuit Court of the United States for the Northern District of Texas.

35 MICHAEL CARLIN vs. TEXAS & PACIFIC RAILWAY COMPANY. } No. 129.

Petition for writ of error.

To judges of the circuit court of the United States in and for the northern district of Texas, at Fort Worth, November term, 1900:

Your petitioner, The Texas & Pacific Railway Company, a corporation duly incorporated by and organized under an act of Congress of the United States, respectfully represents:

That at said term of said court, to wit: on the 11th day of December, 1900, the said Michael Carlin recover against petitioner, The Texas & Pacific Railway Company, judgment for the sum of

$6000.00, with interest from the date of the judgment and costs of suit, in the proceedings for the recovery of which and in the rendition of which there was and is manifest error to the great prejudice of petitioner; that plaintiff resides in the State of Texas, in Tarrant county, that his attorneys of record are E. C. Orrick and J. C Terrell, Jr., residents of Tarrant county, Texas.

That petitioner has filed in this court its assignment of errors and here presents same for the inspection of the court.

Wherefore, petitioner prays that it be granted a writ of error to remove said judgment and proceedings had in said cause to the United States circuit court of appeals for the fifth circuit to be held at New Orleans, Louisiana, for revision, correction and reversal; and your petitioner will ever pray.

T. J. FREEMAN,
F. B. STANLEY,
M. A. SPOONTS,
GEORGE THOMPSON,
Attorneys for Petitioner.

Allowed:
EDWARD R. MEEK,
United States District Judge.

The foregoing has the following endorsement, to wit:

129. In U. S. circuit court at Fort Worth, Texas. Michael Carlin *vs.* Texas & Pacific Railway Company. Petition for writ of error. Filed 14th day of March, 1901. J. H. Finks, clerk, by J. B. Finks, deputy.

36 *Writ of Error Bond.*

Filed March 14th, 1901.

In the Circuit Court of the United States for the Northern District of Texas.

MICHAEL CARLIN
vs.
TEXAS & PACIFIC RAILWAY COMPANY. } No. 129.

Writ of error bond.

Know all men by these presents: that we, The Texas & Pacific Railway Company, a corporation duly incorporated by and organized under an act of Congress of the United States, as principal, and —— —— and —— —— as sureties, are held and firmly bound unto Michael Carlin, in the sum of ten thousand dollars, to be paid to said Michael Carlin, his executors, administrators or assigns, to which payment, well and truly to be made we bind ourselves our heirs, executors, and administrators, jointly and severally by these presents.

Sealed with our seals, using scrolls for seals and signed with our names, this the — day of ——, 1901.

The condition of the foregoing obligation is such that.

Whereas: lately at a term of the circuit court for the northern district of Texas, at Fort Worth in a suit pending in said court between Michael Carlin, plaintiff, and The Texas & Pacific Railway Company, defendant, numbered 129 on the docket of said court, a judgment was rendered on the 11th day of December, 1900, that the plaintiff, Michael Carlin, should have and recover of the defendant the sum of $6000.00, with interest thereon at six per cent. per annum from date of the rendition, as well as all costs of suit, and motion for new trial was overruled on Jan. 14, 1901, and

Whereas, the Texas & Pacific Railway Company has obtained a writ of error and filed a copy thereof in the office of the clerk of said court to reverse said judgment, and also a citation directed to said Michael Carlin, and his attorneys of record E. C. Orrick and J. C. Terrell, Jr., citing and admonishing them to be and appear at the United States circuit court of appeals to be holden at New Orleans, within thirty days from the —.

Now, if the said Texas & Pacific Railway Company shall prosecute its writ of error to effect and answer all damages and costs,
37 if it shall fail to make good its pleas, then the above obligation to be void, else to remain in full force and virtue.

THE TEXAS & PACIFIC RAILWAY COMPANY,
By STANLEY, SPOONTS & THOMPSON,
Its Attorneys.

EDW. O. TENISON,
C. R. BUDDY, *Sureties.*

Approved as a supersedeas bond:

EDWARD R. MEEK,
United States District Judge.

The foregoing has the following indorsement, to wit:

129. U. S. circuit court, northern district of Texas. Michael Carlin *vs.* T. & P. R'y Co. Writ of error bond. Filed 14 day of March 1901. J. H. Finks, clerk, by J. B. Finks, deputy.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judge of the circuit court of the United States for the northern district of Texas, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, or some of you, between The Texas and Pacific Railway Company, plaintiff in error, and Michael Carlin, defendant in error, a manifest error hath happened, to the great damage of the said The Texas and Pacific Railway Company, plaintiff in error, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the

parties aforesaid in his behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States circuit court of appeals, for the fifth circuit, together with this writ, so that you have the same at New Orleans, Louisiana, in not exceeding thirty days from 14th day of March, 1901, being the date of issuance of the citation herein, in the United States circuit court of appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said United States circuit court of appeals may cause further
38 to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 14th day of March, in the year of our Lord one thousand nine hundred and one.

[SEAL.] J. H. FINKS,
Clerk of the Circuit Court of the United States for the Northern District of Texas,
By J. B. FINKS, *Deputy.*

Allowed by:

EDWARD R. MEEK,
United States District Judge.

It is hereby certified that a copy of this writ is this day lodged in the clerk's office for the use of the defendant in error, this 14th day of March, 1901.

J. H. FINKS, *Clerk,*
By J. B. FINKS, *Deputy.*

(Indorsed:) No. 129. Michael Carlin *vs.* Texas & Pacific Railway Company. Writ of error. Filed 14 day of March, A. D. 1901. J. H. Finks, clerk, by J. B. Finks, deputy.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to Michael Carlin and Messrs. Orrick & Terrell, his attorneys of record, Greeting:

You are hereby cited and admonished to be and appear at the United States circuit court of appeals for the fifth circuit, to be held at the city of New Orleans, in the State of Louisiana, within thirty days from the date of this writ, pursuant to a writ of error, filed in the clerk's office of the United States circuit court of the United States for the northern district of Texas, wherein The Texas & Pacific Railway Company is plaintiff in error and Michael Carlin is defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the

United States, this 14th day of March, A. D. 1901, and of the Independence of the United States the 125th year.

EDWARD R. MEEK,
United States District Judge.

39 We hereby acknowledge service of above citation in error.

ORRICK & TERRELL,
Attorneys for Michael Carlin.

(Indorsed:) No. 129. Michael Carlin *vs.* Texas & Pacific Railway Company. Citation. Filed 14 day of March, A. D. 1901. J. H. Finks, clerk, by J. B. Finks, deputy.

List of Papers for Transcript.

Filed March 14, 1901.

In the Circuit Court of the United States for the Northern District of Texas, at Fort Worth.

MICHAEL CARLIN
vs.
TEXAS & PACIFIC RAILWAY COMPANY. } No. 129.

The following papers are to constitute the record on appeal in the case of Michael Carlin *vs.* Texas & Pacific Railway Company, to wit:

1. Plaintiff's first amended original petition, filed December 10th, 1900.
2. Defendant's amended answer filed December 10th, 1901.
3. Judgment.
4. Amended motion for new trial.
5. Order overruling motion for new trial.
6. Order extending time in which to file bill of exceptions.
7. Bill of exceptions.
8. Petition for writ of error.
9. Assignment of errors.
10. Writ of error bond.
11. Writ of error.
12. Citation in error.
13. Clerk's certificate.

ORRICK & TERRELL,
Attorneys for Plaintiff.
STANLEY, SPOONTS & THOMPSON,
Attorneys for Defendant.

The foregoing has the following indorsement, to wit:

129. Michael Carlin *vs.* Texas & Pacific R'y. Co. Filed this 14th March, 1901. J. H. Finks, clerk, by J. B. Finks, deputy.

40 *Clerk's Certificate.*

I, J. H. Finks, clerk of the circuit court of the United States, in the fifth circuit and northern district of Texas, do hereby certify that the above and foregoing is a full, true and correct transcript of the record, bill of exceptions, assignment of errors, and all proceedings in cause No. 129, wherein Michael Carlin is plaintiff and The Texas and Pacific Railway Company is defendant, except that the original writ of error and original citation in error are included therein, instead of copies thereof, as fully as the same remains on file and of record in my office, at Fort Worth, Texas.

Witness my hand officially, and the seal of the United States circuit court for the northern district of Texas, at Fort Worth, Texas, this the 26th day of March, A. D. 1901.

[SEAL.]

J. H. FINKS, *Clerk*,
By J. B. FINKS, *Deputy*.

41 United States Circuit Court of Appeals for the Fifth Circuit, November Term, 1901.

WEDNESDAY, *May* 22, 1901.

(Extract from Minutes.)

TEXAS & PACIFIC RAILWAY COMPANY
vs.
MICHAEL CARLIN. } No. 1048.

This cause was regularly called this day, and submitted to the court after argument by Geo. Thompson for plaintiff in error, and by E. C. Orrick for defendant in error.

42 United States Circuit Court of Appeals, Fifth Circuit, November Term, 1901.

NOVEMBER 19, 1901.

(Extract from Minutes.)

TEXAS & PACIFIC RAILWAY COMPANY, Plaintiff in Error,
vs.
MICHAEL CARLIN, Defendant in Error. } No. 1048.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the northern district of Texas, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said circuit court in this cause be, and the same is hereby affirmed.

It is further ordered and adjudged that the plaintiff in error, The Texas & Pacific Railway Company, and the sureties on the writ of

error bond herein, Edw. O. Tenison and C. R. Buddy, be condemned to pay the costs of this cause in this court, for which execution may be issued out of said circuit court.

43 (Original Filed Nov. 19, 1901. Charles H. Lednum, Clerk.)

United States Circuit Court of Appeals, Fifth Circuit, November Term, 190–.

TEXAS & PACIFIC RAILWAY COMPANY, Plaintiff in Error,
v.
MICHAEL CARLIN, Defendant in Error. } No. 1048.

Error to the circuit court of the United States for the northern district of Texas.

Before Pardee, McCormick, and Shelby, circuit judges.

The opinion will state the case.

Mr. T. J. Freeman, Mr. F. B. Stanley, Mr. M. A. Spoonts, and Mr. George Thompson for plaintiff in error.

Mr. E. C. Orrick and Mr. J. C. Terrell, Jr., for defendant in error.

SHELBY, circuit judge, delivered the opinion of the court.

This is an action for damages for personal injuries brought by Michael Carlin, plaintiff, against The Texas & Pacific Railway Company, defendant. The petition alleged that the plaintiff was in the employ of the defendant as a member of what is known as the bridge gang; and, while at work near where a bridge was being repaired, a train approached with great speed, and as it ran over the bridge a spike maul or heavy iron hammer, weighing six or eight pounds, with a handle attached to it, was caught by the train and thrown against the plaintiff, injuring his leg so that it had to be amputated. The negligence of the company was charged in several ways, one being that the foreman of the bridge gang had failed to see and remove the maul from the bridge. The defendant's answer contained
44 a general denial; and a plea that, if there were negligence, it was that of a fellow-servant of the plaintiff, for which the defendant was not liable; and that the plaintiff was guilty of contributory negligence. The case was tried on these issues, and there was a verdict for the plaintiff for $6,000 damages, on which judgment was entered. A bill of exceptions was reserved by the defendant, and the case is brought here on writ of error.

The plaintiff in error contends that the trial court should have directed a verdict for the defendant. Several of the assignments of error are dependent on that contention and they are discussed together in the arguments submitted.

In every jury trial there is a preliminary question for the court. The court must determine whether or not there is sufficient evidence upon which the jury could base a verdict for the plaintiff. If there

is no evidence, or if it is such that on a fair construction does not sustain the plaintiff's case, and that no fair inference to be drawn from it sustains it, the court should give the peremptory instruction. There is no good sense in permitting a verdict that it would be the duty of the court to set aside. But it is not the province of the court to weigh the evidence and decide between conflicting statements of witnesses; or to decide what inference should be drawn from uncontradicted evidence if different minds could fairly come to different conclusions from it. A question of negligence dependent on evidence should not be taken from the jury except in cases where there is no material conflict and where there is no room for different minds to draw different inferences from it. The question of negligence is one of law for the court only when the facts are such that all reasonable men must draw the same conclusions from them. A case should not be withdrawn from the jury unless the conclusion follows as matter of law that no recovery can be had upon any view that can be properly taken of the facts the evidence tends to establish.

The plaintiff, Carlin, was one of several members of a bridge gang. Welsh was the foreman in charge and control of the gang. The
45 foreman and gang had gone to the bridge on the defendant's railway to repair it. Ed. Carver, one of the gang, used an iron maul or hammer about ten inches long, weighing six or eight pounds, to drive spikes in the bridge. It had a wooden handle about three feet long. Welsh, the foreman, directed the plaintiff to sharpen a saw. Pursuing their work under the direction of the foreman, all the men left the bridge. Welsh alone remained on the bridge. It was his duty to see that the bridge was kept free from obstructions, so that trains could safely pass. Where Carver laid the maul when he left the bridge is not shown by direct evidence. Ten or fifteen minutes after he was using the maul a train approached rapidly and crossed the bridge. Welsh says he looked on the bridge and saw no obstruction; that he did not see the maul. He stepped out of the way of the passing train. As the train passed, the plaintiff, who was more than twenty feet from the track, was seen to fall. His leg was broken so as to require amputation. Lying near him was the iron maul with the handle freshly broken. The conclusion is irresistible that the cars in passing had struck the maul, breaking the handle and hurling it against him.

One of the averments of negligence in the petition is that the company was negligent in that Welsh, the foreman of the bridge gang, failed to see that the bridge was clear of obstructions and in failing to detect the maul on the bridge and in leaving it there to obstruct the bridge.

In the absence of a controlling statute it may be conceded that Welsh, the foreman, and the plaintiff, a member of the bridge gang, would have been fellow-servants, and Carlin would have had no cause of action against the company. McDonald *v.* Buckley, 109 Fed. Rep. 290; New England Railroad Co., *v.* Conroy, 175 U.S. 323. But there are statutes in Texas applicable to the case. By these statutes, in a case like this, a servant or employé who has the authority to direct any other employé in the performance of any

duty of such employé, is a vice-principal, and not a fellow-servant.

By the express terms of the statute employés are not con-
46 sidered fellow-servants unless they "are in the same grade of employment, and are doing the same character of work or service and are working together at the same time and place, and at the same piece of work and to a common purpose." Sayles' Civil Statutes of Texas, 1897, arts. 4560*f*; 4560*g*; 4560*h*. The statutes are printed in the margin.

Marginal Note.

"Art. 4560*f*. Every person, receiver or corporation operating a railroad or street railway, the line of which shall be situated in whole or in part in this State, shall be liable for all damages sustained by any servant or employé thereof while engaged in the work of operating the cars, locomotives or trains of such person, receiver or corporation, by reason of the negligence of any other servant or employé of such person, receiver or corporation, and the fact that such servant or employés were fellow-servants with each other shall not impair or destroy such liability.

"Art. 4560*g*. All persons engaged in the service of any person, receiver or corporation, controlling or operating a railroad or street railway, the lines of which shall be situated in whole or in part in this State, who are intrusted by such person, receiver or corporation with the authority of superintendence, control or command of other servants or employés of such person, receiver or corporation, or with the authority to direct any other employé in the performance of any duty of such employé are vice-principals of such person, receiver or corporation, and are not fellow-servants with their co-employés.

"Art. 4560*h*. All persons who are engaged in the common service of such person, receiver or corporation, controlling or operating a railroad or street railway, and who while so employed are in the same grade of employment, and are doing the same character of work or service, and are working together at the same time
47 and place and at the same piece of work and to a common purpose, are fellow-servants with each other. Employés who do not come within the provisions of this article shall not be considered fellow-servants." Sayles' Civil Statutes of Texas, 1897, arts. 4560*f*, 4560*g*, 4560*h*.

It is clear that on the proof Welsh was in control and command of the plaintiff and that they were not in the same grade of employment, nor at the time of the accident were they doing the same character of work or service. Under the Texas statute, according to its letter, or as construed by the Texas supreme court, they were not fellow-servants. Long *v.* Chicago, R. I. & T. R'y Co., (supreme court of Texas). 57 S. W. Rep. 802; Nix *v.* Texas & Pacific Railway Co., 18 S. W. Rep. 571. We must be controlled by these statutes and their construction by the Texas supreme court. R. S. U. S.,

sec. 721; B. & O. Railroad *v.* Baugh, 149 U. S. 368. It follows that the company would be responsible to the plaintiff if he received the injuries from the negligence of Welsh.

The contention for the peremptory charge must be and is based on the idea that there is no proof of negligence on the part of Welsh. There is no conflict in the evidence that it was Welsh's duty to see that the bridge was not obstructed. He says he looked and saw no obstruction. It is claimed that there is no evidence as to the location of the maul when the train reached the bridge; that there is no proof that it was in sight; that if Carver had placed it where Welsh could not have seen it, that it was negligence in Welsh to fail to see and remove it. Negligence, like any other fact, may be proved by circumstantial evidence. The indisputable fact that the cars struck the maul and hurled it so that it struck the plaintiff, shows that the maul lay where the cars could strike it. Welsh was alone on the bridge as the train approached. It was proved that the surface of the bridge was plain; made with the cross-ties about eighteen inches apart, on which were the rails and the guard-rails, with nothing on them or near them to cover or hide the maul. When the evidence shows that the cars struck the maul on the bridge so
48 constructed, is not that a fact from which the jury might infer that it was lying in plain view, near the rail? If such inference be not unreasonable, the question was one for the jury.

We cannot adopt the suggestion or intimation that in cases like this, owing to the alleged inclination of juries to find against corporations, that we should assume that the jury has been influenced otherwise than by a consideration of the evidence. To adopt the expression of a distinguished judge, "we see no reason, so long as the jury system is the law of the land, and the jury is made the tribunal to decide disputed questions of fact, why it should not decide such questions as these as well as others." Jones *v.* East Tennessee &c. Railroad Co., 128 U. S. 443.

It must be conceded that the injury for which the action is brought occurred in an extraordinary and unusual manner. Just such an occurrence was not to be anticipated. The defendant requested the trial judge to instruct the jury that although they may find that the foreman failed to discover the maul, "yet if you believe from the evidence that the result which followed from his failure to discover it was not such result as ought to have been foreseen in the light of the attending circumstances, then, in such event, the failure of the foreman to discover the proximity of the hammer would not be such negligence as would make the defendant liable, and you must find for the defendant." The court did not err in refusing to adopt this view of the case. It may be true that the accident in its extraordinary form, with its peculiar circumstances, could not have been expected to happen from the maul being left on the bridge near the rail, yet the act of permitting it to remain there was none the less negligent, for it threatened danger in many directions. It was liable to produce familiar results which would cause serious injury. The fact that it happened to cause the injury in a manner so unusual that it was not to be expected, cannot prevent

the act from being negligent when it was likely to cause injury in a way that might be foreseen. It may be true that the negli-
49 gence in this case produced an effect not before observed—the circumstances of which could not have been anticipated. But if it was negligence likely to produce other and familiar injuries, the peculiarity of the accident does not prevent liability. Doyle *v.* Chicago, St. Paul & Kansas City R. Co., 39 Am. & Eng. Railroad Cases, 314. The extraordinary circumstances attending the injury cannot serve as a defense. To so hold would be to say that a plaintiff must show similar injuries to have occurred in the same manner before he could recover. And it would lead to the anomalous result that for the first and perhaps the second injury occurring in such manner there could be no recovery, but for the third, or when the circumstances ceased to be peculiar or became familiar, the defendant would be liable.

It is contended that if Ed. Carver left the maul close to the rail or track, that this act of Carver's was the direct or proximate cause of the injury. It is true that, if the maul had not been placed near the rail, Carlin would not have been injured. But we do not think that this act of Carver's, conceding it to be proved, constituted the proximate cause of the injury. When he finished driving the spikes with the maul he would be expected to lay it down. The tools of the workman, and the material in use to repair the bridge, could only be rightfully on the bridge and on the track when no train was to pass. Sometimes they would necessarily be left for a short time on the bridge. They could be there without negligence on some occasions. It would, of course, be negligence to leave them on the track for a train to run over them. The fact that they were so placed on the track, the men negligently leaving them there, could not make it the less negligent for the foreman to fail to perform his duty to remove them or cause them to be removed. To illustrate: The gang might remove a defective rail on a bridge to put in a new one. If the foreman failed to put out a flag or to use or cause to be used other means to stop the train coming on the bridge while the rail was off—that being his duty—and an accident occurred, it could not be said that the act of the gang in removing the
50 rail was the proximate cause of the accident. The proximate cause of the accident would be the failure of the foreman to stop the train. Placing the maul on the bridge may have been an innocent act connected with its use. It may be conceded that Carver was negligent to leave it there. The fact, not disputed in evidence, that the duty was imposed on the foreman to see that the bridge was kept free from obstructions, shows that it was deemed unsafe by the company to rely alone on the men to voluntarily keep it free. Conceding the negligence of Carver, could that excuse or relieve Welsh from the performance of his duty? He was left alone on the bridge, and, as the proof tends to show, near the maul when the train was approaching. He had time to remove it. If he negligently failed to see it, or, seeing it failed to remove it, that was the negligence constituting the proximate cause of the accident.

The preceding act of Carver could not relieve the company of its responsibility for Welsh's failure to perform his duty.

We have carefully examined all the assignments of error, and find no reversible error in the case.

The judgment of the circuit court is affirmed.

51 United States Circuit Court of Appeals, Fifth Circuit.

THE TEXAS & PACIFIC RAILWAY COMPANY, Plaintiff in Error,
vs.
MICHAEL CARLIN, Defendant in Error.
} No. 1049.

Now comes The Texas & Pacific Railway Company, plaintiff in error, by its attorney, and says that in the record and proceedings in the above-entitled cause, there is manifest error in this, to wit:

I.

The circuit court of appeals erred in its judgment affirming the judgment of the circuit court for the northern district of Texas.

II.

The circuit court of appeals erred in its judgment affirming the judgment of the circuit court for the northern district of Texas and in holding that said court committed no error in the second paragraph of the court's charge, wherein the court, in defining negligence, instructed the jury as follows:

"Or in other words, negligence consists in omitting to do something which an ordinar-y prudent man would not omit, and in doing something which an ordinar-y prudent man would — do under similar circumstances."

III.

The circuit court of appeals erred in its judgment affirming the judgment of the circuit court for the northern district of Texas, and in holding that said court committed no error in the third paragraph of its charge, wherein the court instructed the jury as follows:

52 "The foreman of the bridge gange was, under the evidence, the vice-principal of the defendant company."

IV.

The circuit court of appeals erred in its judgment affirming the judgment of the circuit court for the northern district of Texas, and in holding that said court committed no error in the fifth paragraph of the court's charge, wherein the court instructed the jury as follows:

"If you believe from the evidence that the injury to plaintiff was caused by the negligence of a fellow-servant, and that the foreman in charge of the bridge gang was not guilty of negligence which

directly and proximately contributed to the injury of the plaintiff, then, and in that event, it would be your duty to find for the defendant."

V.

The circuit court of appeals erred in its judgment affirming the judgment of the circuit court for the northern district of Texas, and in holding that said court committed no error in refusing to give special charge asked by plaintiff in error as follows:

"In this case the jury are instructed that under the law and evidence, a plaintiff is not entitled to recover, and they will therefore, find a verdict for the defendant."

VI.

The circuit court of appeals erred in its judgment affirming the judgment of the circuit court for the northern district of Texas, and in holding that said court committed no error in refusing to give special charge asked by plaintiff in error, as follows:

"In this case the jury will not consider as elements of negligence the rate of speed at which the train may have been running, or the fact that the bridge foreman did not have any flags out on that occasion and they will, therefore, eliminate these matters from their determination of the liability of the defendant in this case."

VII.

The circuit court of appeals erred in its judgment affirming the judgment of the circuit court for the northern district of Texas, and in holding that said court committed no error in refusing to give special charge asked by plaintiff in error, as follows:

"The jury are instructed that in order to find the defendant liable for any act of the bridge foreman, they must find that any
53 failure on his part to discover the close proximity of the maul, was negligence; that is he failed to do what a person of ordinary prudence would have done under like or similar circumstances.

They must also find that such negligent act was the proximate cause of the injury, that is, that the injury was the natural and probable consequence of the negligent or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances. Probable consequence is, when it is more likely to follow this supposed cause than it is to fail to follow it.

Bearing in mind the above definitions, the court further instructs you that although you may find the foreman failed to exercise ordinary care to discover the maul, yet if you believe from the evidence that the result which followed from his failure to discover it was not such result as ought to have been foreseen in the light of the attending circumstances then in such event, the foreman in failing to discover the proximity of the hammer, would not be such negligence as would make the defendant liable, and it would be the duty of the jury to find for the defendant."

VIII.

The circuit court of appeals erred in its judgment affirming the judgment of the circuit court for the northern district of Texas, and in holding that said court committed no error in refusing to give special charge asked by plaintiff in error, as follows:

"The court instructs the jury that the burden of proof is upon the plaintiff to show negligence, and show that such negligence was the direct and proximate cause of the injury, and unless he has done so, they will find for the defendant."

IX.

The circuit court of appeals erred in its judgment affirming the judgment of the circuit court for the northern district of Texas, and in holding that said court committed no error in refusing to give special charge asked by plaintiff in error, as follows:

"If the jury find that the maul or hammer had been in use by one Ed. Carver just before the accident, and was by him left in close or dangerous proximity to the rail or track, and that this act of Carver was the direct and proximate cause of the accident, they will find for defendant as it would not be lieble for any of the negligent acts of the said Carver, as he would be a fellow-servent of plaintiff."

X.

The circuit court of appeals erred in its judgment affirming the judgment of the circuit court for the northern district of Texas, and in holding that said court committed no error in refusing to give special charge asked by plaintiff in error, as follows:

"Although Welch, the bridge foreman may have been in law, the representative of the company, yet if they find that the act of examining the track, as the train might be approaching, for the purpose of ascertaining whether or not any obstruction was upon or near it, was a duty, — may be expected to be performed by any
54 one of the men irrespective of his grade or rank, that is to say, by the foreman and men alike as occasion and circumstances might require; then, in such event, the act or duty of Welch in this respect was one which existed between fellow-servants, and defendant would not be liable for the negligent acts of Welch in this respect, if any there were."

XI.

The circuit court of appeals erred in its judgment affirming the judgment of the circuit court for the northern district of Texas, and in holding that said court committed no error in refusing to give special charge asked by plaintiff in error, as follows:

"The jury are instructed that the foreman was not required to assume that any one of the men who had been using any tool, would be negligent in respect to where it should be left, but he had a right to assume that such person would leave it in such position as not to be in dangerous proximity to the track, and in making his examination

of the track as the train approached, ordinary care would not have required him to anticipate or suppose that Carver had been negligent in respect to the place where he had left the maul in question."

XII.

The circuit court of appeals erred in its judgment affirming the judgment of the circuit court for the northern district of Texas, and in holding that said court committed no error in refusing to give special charge asked by plaintiff in error as follows:

"If the evidence in this case justifies the conclusion that the accident was an unforeseen one, as is equally consistent as the conclusion that it should have been anticipted, in view of the surrounding circumstances, then in such event the jury should bring in a verdict for the defendant."

XIII.

The circuit court of appeals erred in its judgment affirming the judgment of the circuit court for the northern district of Texas, and in holding that said court committed no error in refusing to sustain the objection of the plaintiff in error to the testimony of the witness Ed. Carroll who was asked what were the duties of a bridge foreman with reference to signalling approaching trains when engaged in repairing bridges, and to state what were the duties of a foreman in regard to seeing that a bridge is clear of obstructions when a train approaches, to which question the plaintiff in error objected as
55 calling for a conclusion and opinion of the witness and not a fact, to which question the witness answered that if the foreman was expected to do anything to a bridge that would injure a train, he was supposed to put out flags and everybody else was supposed to see that there was no obstruction to the train as soon as he got out the flags.

—IV.

The circuit court of appeals erred in its judgment affirming the judgment of the circuit court for the northern district of Texas, and in holding that said court committed no error in refusing to sustain the objection of the plaintiff in error to the testimony of Ed. Carroll who was asked what was his duty with reference to seeing that a bridge was clear, to which the plaintiff in error objected as calling for a conclusion, and opinion of the witness and not a fact, to which question the witness answered that it would be the same thing, that is, to see that there was no obstruction and to see that it was clear at all times unless he had flags out.

XV.

The circuit court of appeals erred in its judgment affirming the judgment of the circuit court for the northern district of Texas, and in holding that said court committed no error in refusing to hold that the verdict of the jury was against the evidence, for the reason that it appeared from the evidence that the servants of the plaintiff

in error had exercised due care to discover any danger or any obstruction on the track.

XVI.

The circuit court of appeals erred in its judgment affirming the judgment of the circuit court for the northern district of Texas, and in holding that said court committed no error in refusing to hold that the verdict of the jury was contrary to the evidence, because it appeared that if there was any evidence at all, that it was the negligence of a fellow-servant of defendant in error.

XVII.

56 The circuit court of appeals erred in its judgment affirming the judgment of the circuit court for the northern district of Texas, and in holding that said court committed no error in refusing to hold that the verdict of the jury was contrary to the law and the evidence, in that it appeared from the evidence that the negligence of the foreman in failing to discover the obstruction on the track, was not the proximate and direct cause of the accident.

XVIII.

The circuit court of appeals erred in its judgment affirming the judgment of the circuit court for the northern district of Texas, and in holding that said court committed no error in refusing to hold that the verdict of the jury was without sufficient evidence to sustain it, because it appeared from the evidence that the direct and proximate cause of the accident was the negligence of Ed. Carver in leaving the hammer on the track, and plaintiff in error could not have reasonably anticipated that such would have been done.

Wherefore, The Texas and Pacific Railway Company, plaintiff in error, prays that said judgment be reversed, and it will ever pray.

T. J. FREEMAN,
Attorney for The Texas and Pacific Railway Company, Plaintiff in Error.

Endorsed: No. 1048. The Tex. & Pac. R'y Co. *vs.* Michael Carlin. Assignments of error. Filed December 31, 1901. Charles H. Lednum, clerk.

57 Know all men by these presents, that we, The Texas and Pacific Railway Company, as principal, and George J. Gould, of Lakewood, New Jersey, as surety, are held and firmly bound unto Michael Carlin in the full and just sum of twelve thousand (12,000) dollars, to be paid to the said Michael Carlin or his certain attorney, executors, administrators, or assigns: to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 27th day of December in the year of our Lord one thousand nine hundred and one.

Whereas, lately at a regular term of the circuit court of the United States in and for the northern district of Texas and on December 11, 1900 in a suit depending in said court, between Michael Carlin, plaintiff, and The Texas and Pacific Railway Company, defendant, a judgment was rendered against said railway company for the sum of six thousand dollars ($6,000) besides costs of suit; and

Whereas from said judgment the said railway company duly obtained a writ of error from the United States circuit court of appeals for the fifth circuit which court, on the 19th day of November 1901, rendered a judgment affirming the said judgment, and the said The Texas and Pacific Railway Company having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Michael Carlin or his attorneys of record citing and admonishing him to be and appear at a Supreme Court of the United States at Washington within 30 days from the date thereof.

Now, the condition of the above obligation is such, that if the said The Texas and Pacific Railway Company shall prosecute its said writ to effect, and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

THE TEXAS AND PACIFIC
RAILWAY COMPANY,
By GEORGE J. GOULD, *Pres't.*
GEORGE J. GOULD. [SEAL.]

Sealed and delivered in presence of—
D. D. DUNCAN.

[Corporate Seal.]

Attest: C. E. SATTERLEE, *Sec'y.*

Approved to operate as a supersedeas by
EDWARD D. WHITE,
Justice of the Supreme Court of the United States.

[Endorsed:] No. 1048. The Texas & Pacific R'y Co. *v.* Michael Carlin. Bond. Filed Dec. 31, 1901. Charles H. Lednum, clerk.

58 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the United States circuit court of appeals for the fifth circuit, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court of appeals, before you, or some of you, between The Texas and Pacific Railway Company, plaintiff in error, and Michael Carlin, defendant in error, a manifest error hath happened, to the great damage of the said The Texas and Pacific Railway Company, as by

its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 28th day of December, in the year of our Lord one thousand nine hundred and one.

[Seal of the Supreme Court of the United States.]

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by

EDWARD D. WHITE,
Associate Justice of the Supreme Court of the United States.

[Endorsed:] No. 1048. The Texas & Pacific R'y Co. *v.* Michael Carlin. Writ of error. Filed Dec. 31, 1901. Charles H. Lednum, clerk.

A copy of this writ is this day lodged in my office for the use of the defendant in error.

December 31, 1901.

CHARLES H. LEDNUM,
Clerk of the United States Circuit Court of Appeals for the Fifth Circuit.

59 UNITED STATES OF AMERICA, ss:

To Michael Carlin or his attorneys of record, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error, filed in the clerk's office of the United States circuit court of appeals for the fifth circuit, wherein The Texas and Pacific Railway Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Edward D. White, associate justice of the

Supreme Court of the United States, this 28th day of December, in the year of our Lord one thousand nine hundred and one.

EDWARD D. WHITE,
Associate Justice of the Supreme Court of the United States.

[Endorsed:] Carlin citation. Filed Jan'y 6, 1902. Charles H. Lednum, clerk.

We hereby accept service of this citation and acknowledge receipt of a true copy thereof January 2nd, 1902.

E. C. ORRICK,
J. C. TERRELL, JR.,
Attorney- of Record for Michael Carlin.

60 *Clerk's Certificate.*

I, Charles H. Lednum, clerk of the United States circuit court of appeals for the fifth circuit, do hereby certify that the above and foregoing is a full, true and correct transcript of the record, bill of exceptions, assignments of error and all proceedings had in cause No. 1048, The Texas & Pacific Railway Company, plaintiff in error, *vs.* Michael Carlin, defendant in error, except that the original writ of error and citation in error are included therein, instead of copies thereof, as fully as the same remains of record and on file in my office at New Orleans, Louisiana.

Witness my hand officially and the seal of said court at New Orleans, Louisiana, this 10th day of January, A. D. 1902.

[Seal United States Circuit Court of Appeals, Fifth Circuit.]

CHARLES H. LEDNUM,
Clerk of the United States Circuit Court of Appeals for the Fifth Circuit.

Endorsed on cover: File No. 18370. U. S. circuit court of appeal, 5th circuit. Term No. 222. The Texas and Pacific Railway Company, plaintiff in error, *vs.* Michael Carlin. Filed January 15, 1902.